

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE 1976 UNCITRAL ARBITRATION RULES**

BETWEEN:

RESOLUTE FOREST PRODUCTS INC.

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

PCA CASE No. 2016-13

**COMMENTS OF THE GOVERNMENT OF CANADA IN RESPONSE
TO THE SECOND NAFTA ARTICLE 1128 SUBMISSIONS OF THE UNITED
STATES OF AMERICA AND THE UNITED MEXICAN STATES**

May 8, 2020

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1. Canada respectfully submits the following comments in response to the Second Submission of the United States of America (April 20, 2020) and the Second Submission of the United Mexican States (April 23, 2020) made pursuant to NAFTA Article 1128.

2. With respect to NAFTA Article 1102, both the United States and Mexico reaffirm what they have already submitted previously in this arbitration¹ and fully support what Canada has argued since the beginning of this case: Article 1102, *including* subparagraph 3 which applies to states and provinces, is intended to prevent discrimination on the basis of nationality.² The mere fact there is less favourable treatment between a domestic investor and foreign investor (or their investments) in like circumstances does not establish a breach of Article 1102. Rather, for a breach of the national treatment obligation to be found, there must be evidence that the discrimination was based on nationality. This is the longstanding and consistently-held position of all three NAFTA Parties,³ and it is supported by NAFTA tribunals and academic commentary.⁴

3. Furthermore, the submissions by the United States and Mexico support what Canada argued previously and what the Tribunal found in its Decision on Jurisdiction and Admissibility with respect to Article 1102(3), namely that this provision “should not be read so as to impose, vis-à-vis foreign investments, a requirement of uniformity of treatment by the different component units of the three federal States which are Parties to NAFTA.”⁵

¹ *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Submission of the United States of America, 14 June 2017, ¶¶ 15-17 (“United States First Article 1128 Submission”); *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant NAFTA Article 1128, 14 June 2017 (“Mexico First Article 1128 Submission”), ¶¶ 12-13.

² *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Second Submission of the United States of America, 20 April 2020 (“United States Second Article 1128 Submission”), ¶¶ 4-6; *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Second Submission of the United Mexican States, 23 April 2020 (“Mexico Second Article 1128 Submission”), ¶¶ 3-9. See *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Canada’s Counter-Memorial on Merits and Damages, 17 April 2019 (“Canada’s Counter-Memorial”), ¶¶ 250-253; *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Canada’s Rejoinder Memorial on Merits and Damages, 4 March 2020 (“Canada’s Rejoinder”), ¶¶ 90-102.

³ See Canada’s Counter-Memorial, ¶ 250 and references cited therein; United States Second Article 1128 Submission, ¶ 5 and references cited therein.

⁴ See Canada’s Counter-Memorial, ¶¶ 250-251 and references cited therein; Canada’s Rejoinder Memorial, ¶ 99 and references cited therein.

⁵ *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018 (“Decision on Jurisdiction and Admissibility”), ¶ 290; United States Second

Applied in the context of the debate as to whether Nova Scotia afforded “treatment” to Resolute or whether Resolute and PHP were “in like circumstances”, it is clear that Article 1102(3) does not require that the treatment afforded by the Government of Nova Scotia to the Port Hawkesbury mill be given to Resolute’s mills in Québec.

4. With respect to Article 1105 and the minimum standard of treatment of aliens, the submission of the United States is fully concordant with what Canada has previously argued regarding customary international law, particularly with respect to general principles of good faith, proportionality and non-discrimination.⁶ Regarding good faith, while Resolute’s argument is primarily intended to preclude Canada’s reliance on NAFTA Article 1108(7)(b), as noted by the United States, there is no basis in NAFTA Chapter Eleven or in customary international law to make a bare claim of a breach of good faith.⁷ This would include an attempt (as Resolute does here) to avoid the application of an explicit provision of NAFTA Chapter Eleven. The United States also takes the same position as Canada with respect to proportionality and non-discrimination: there is no state practice and *opinio juris* establishing an obligation of proportionality or a prohibition on economic discrimination under the customary international law minimum standard of treatment of aliens.

5. Finally, the United States’ submission with respect to limitations on loss or damage is in agreement with Canada’s submissions.⁸ Inherent to the NAFTA requirement that recovery be limited to loss or damage “by reason of, or arising out of” a breach⁹ is the need

Article 1128 Submission, ¶¶ 10-12; Mexico Second Article 1128 Submission, ¶¶ 3-9. Canada has advocated precisely that position: “It is untenable to argue that the NAFTA Parties intended for the treatment by one state or province would become the national standard for the entire country.” (*Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Canada’s Reply Memorial on Jurisdiction, 29 March 2017, ¶ 161). In its Decision on Jurisdiction and Admissibility, the Tribunal also agreed with the *Merrill & Ring* tribunal’s conclusion that Article 1102(3) only applies to the same regulatory measures under the same jurisdictional authority (Decision on Jurisdiction and Admissibility, ¶ 290). Canada has argued the same. See *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Canada’s Memorial on Jurisdiction, 22 December 2016, ¶¶ 120-121; Canada’s Counter-Memorial, ¶ 268.

⁶ United States Second Article 1128 Submission, ¶¶ 20-24; Canada’s Counter-Memorial, ¶ 288; Canada’s Rejoinder Memorial, ¶¶ 73-75, 134-138.

⁷ United States Second Article 1128 Submission, ¶¶ 21-22.

⁸ United States Second Article 1128 Submission, ¶¶ 29-33; Canada’s Counter-Memorial, ¶¶ 325-338 and references cited therein; Canada’s Rejoinder Memorial, ¶¶ 208-211 and references cited therein.

⁹ NAFTA Articles 1116 and 1117.

for the Claimant to show both factual causation and proximate causation. As the United States points out, the former test will not be met if the same result would have occurred had the breaching State acted in compliance with its obligations, and the latter test will not be met where any loss or damage is based on an assessment of acts, events or circumstances not attributable to the alleged breach. Since SC paper prices dropped for many reasons other than the alleged breach, the Claimant's case fails to satisfy both grounds.

6. As Canada has previously argued,¹⁰ and as both the United States and Mexico have reaffirmed, customary international law, as codified in Article 31(3) of the *Vienna Convention on the Law of Treaties*, requires the Tribunal to take into account the subsequent agreement and subsequent practice of the three NAFTA Parties when it comes to the interpretation of the treaty. Canada respectfully submits that the Tribunal should give considerable weight to the submissions of the United States and Mexico.

May 8, 2020

Respectfully submitted on behalf of the
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¹⁰ *Resolute Forest Products Inc., v Government of Canada* (UNCITRAL) Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the Government of the United States and the United Mexican States, 12 July 2017, ¶¶ 4-8.